



## FINANCIAL PLANNING COALITION

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attention: Conflicts of Interest Rule  
Room N-5655

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attention: D-11712 and D-11713

United States Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

***RE: Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32***

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),<sup>1</sup> which is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), appreciates the opportunity to comment on the re-proposal by the Department of Labor, Employee Benefits Security Administration (the Department) to expand the definition of the term “fiduciary” under the Employee Retirement Income Security Act (ERISA) (hereinafter “Re-Proposed Rule”).<sup>2</sup> CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 72,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.<sup>3</sup> FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 24,000 members nationwide.<sup>4</sup> NAPFA is the nation's

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<sup>1</sup> The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

<sup>2</sup> Definition of the Term “Fiduciary,” 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

<sup>3</sup> CFP Board's mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics and subject themselves to disciplinary oversight of CFP Board.

<sup>4</sup> With a national network of over 90 chapters, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.<sup>5</sup>

The Coalition brings a unique perspective to the table. Coalition stakeholders and members have committed to provide financial services under a fiduciary standard of conduct pursuant to each organization's code of professional conduct.<sup>6</sup> CFP® professionals and FPA members hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers and/or insurance agents and in many instances hold dual or multiple registrations or licenses. Regardless of business model, or compensation model, they are obligated to provide financial planning services under a fiduciary standard of conduct. We seek to bring our experience, guiding our stakeholders and members in the application of the fiduciary standard across business and compensation models, to the Department in this comment letter.

The Coalition commends the Department for taking further steps to enhance protections for Retirement Investors. We believe that a strengthened fiduciary rule is necessary and appropriate for Advisers<sup>7</sup> under ERISA, and strongly support adoption of the Department's Re-Proposed Rule. The current regulatory framework allows Advisers' interests to be misaligned with Retirement Investors' interests. Under this framework, the current fiduciary definition under ERISA includes significant loopholes that allow for the sale of products that may not be in the best interest of the Retirement Investor. Importantly, while many Advisers seek to do what is best for their clients, others take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the Adviser well but eat away at Retirement Investors' nest eggs over time.

Many in the financial services industry who claim that they support a best interest standard argue that the Re-Proposed Rule is unworkable. The Coalition believes, based on our experience applying the fiduciary standard to CFP® professionals across business models, that the Re-Proposed Rule is both workable and essential to protect America's Retirement Investors. Importantly, the Department has demonstrated its willingness to work with industry and the public to develop a final rule that will increase fiduciary protection for tax-preferred retirement assets and at the same time works across the varied financial services business models.

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<sup>5</sup> NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association's Code of Ethics. NAPFA-affiliated advisors are committed to the organization's core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

<sup>6</sup> See CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4 available at <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct>; FPA®, "Standard of Care," available at <http://www.onefpa.org/about/Documents/Standard%20of%20Care.pdf>; NAPFA, "Mission and Fiduciary Oath," available at <https://www.napfa.org/about/FiduciaryOath.asp>.

<sup>7</sup> Consistent with the Department's naming convention, by using the term "Adviser" the Coalition does not intend to limit its use to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As used herein, an Adviser can be an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer.



The Department's Re-Proposed Rule addresses concerns raised by firms, industry organizations and consumer and public interest organizations<sup>8</sup> related to the original fiduciary rule proposed by the Department in 2010.<sup>9</sup> Specifically, the Department listened to and addressed these concerns with a comprehensive rulemaking that includes a revised definition of who is a "fiduciary" under ERISA that expands the reach of the fiduciary duty to all retirement assets; principles-based Prohibited Transaction Exemptions (PTEs) to provide flexibility across business models for Advisers to adhere to a fiduciary standard; and a Regulatory Impact Analysis that establishes the need for the rule consistent with regulatory requirements.

Far from being unworkable, we believe the Re-Proposed Rule is both workable and essential. To make it more workable, the Coalition has focused its comment letter on areas where we believe the rule can be improved. The Coalition seeks clarification of certain issues and proposes modifications to others to allow for a more practical application of the fiduciary standard to various business models.

### **I. The Department's Re-Proposed Rule is Needed to Protect Consumers**

During the 40 years since the Department promulgated the current fiduciary rule under ERISA, the retirement landscape has changed drastically, with a dramatic shift from defined benefit plans to savings vehicles such as 401(k) plans, which did not exist when the rule went into effect in 1974, and Individual Retirement Accounts (IRAs), which contained only \$3 billion in aggregate assets at that time.<sup>10</sup> Retirement assets have grown significantly since 1974 when ERISA took effect. As of the end of the first quarter of 2015, assets in IRAs totaled \$7.6 trillion and 401(k) plan assets totaled \$6.8 trillion.<sup>11</sup>

Facing growing responsibility for their own retirement savings and an increasingly complex universe of financial products and services, Americans today must depend upon competent and ethical Advisers to help make decisions critical to their financial security. Fiduciary-level advice is particularly critical when Americans roll over their 401(k) plan assets into IRAs. For many Americans, whether to roll over and how to invest their retirement nest egg is one of the most important financial decisions they will make in their lifetime. Unfortunately, under the current regulatory framework, not all Advisers are required to make rollover or IRA recommendations in their clients' best interest, leaving Americans subject to conflicted advice related to their retirement savings.

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<sup>8</sup> Letter from Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards, Inc., to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Feb. 3, 2011), <http://www.dol.gov/ebsa/pdf/1210-AB32-155.pdf>; Letter from Ellen Turf, Chief Executive Officer, National Association of Personal Financial Advisors, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Apr. 12, 2011), <http://www.dol.gov/ebsa/pdf/1210-AB32-PH057.pdf>.

<sup>9</sup> Definition of the Term "Fiduciary," 75 Fed. Reg. 65,263 (Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510) [hereinafter "Original Rule"].

<sup>10</sup> ICI, Research Perspective, "The Evolving Role of IRAs in U.S. Retirement Planning," Nov. 2009, Vol. 15, No. 3, available at <https://www.ici.org/pdf/per15-03.pdf>.

<sup>11</sup> ICI, "Retirement Assets Total \$24.9 Trillion in First Quarter 2015," Jun. 24, 2015, available at [https://www.ici.org/research/stats/retirement/ret\\_15\\_q1](https://www.ici.org/research/stats/retirement/ret_15_q1).

**a. The Current Regulatory Framework Allows Advisers' Interests to be Misaligned with Consumers' Interests**

While some segments and practices within the financial services industry are highly regulated, the current patchwork of regulatory frameworks, which has evolved over decades, does not adequately protect consumers of retail financial advice.

Importantly, the current fiduciary definition under ERISA includes significant loopholes that allow Advisers to provide advice about and sell financial products that may be suitable for Retirement Investors, but are not necessarily in their best interest.<sup>12</sup> For example, under the less rigorous suitability standard, Advisers are permitted by law to recommend products that are not in the best interest of the consumer, including recommending products that are more expensive to consumers and that pay more to the Advisers. In addition, compensation practices, which are completely legal under current regulations, provide substantial incentives to Advisers to place the interests of the Financial Institution and the Adviser ahead of the Retirement Investor's interests. Very simply, the current regulatory framework allows the interests of Financial Institutions and Advisers to be misaligned with the interests of our nation's Retirement Investors.

Contrary to many in the financial services industry who claim that the Re-Proposed Rule is unnecessary and that there are only a few "rogue" Advisers harming Retirement Investors, the misalignment of interests is widespread throughout the financial services industry. For example, the Financial Industry Regulatory Authority (FINRA) noted in an October 2013 Report that conflicts of interest are pervasive and "widespread across the financial services industry."<sup>13</sup> In addition, FINRA's recent 2015 Examination Priorities letter states that "[a] central failing FINRA has observed is firms not putting customers' interests first."<sup>14</sup>

Retirement Investors are harmed – primarily in the form of higher costs and lower retirement savings – when they receive conflicted advice that puts the Adviser's interest ahead their own. To illustrate the magnitude of harm to Retirement Investors, the Department has published a comprehensive Regulatory Impact Analysis that accompanies the Re-Proposed Rule and illustrates the harmful impact of conflicts of interest, including increased costs to investors under the current regulatory framework.<sup>15</sup>

Based upon a wide range of independent studies, the Department estimates that, as a result of conflicted advice, Retirement Investors will lose between \$210 billion and \$430 billion over 10 years, and between \$500 billion and \$1 trillion over 20 years, in the mutual fund investments in

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<sup>12</sup> These loopholes arise from the current regulatory system where broker-dealer registered representatives and insurance agents, unlike investment advisers, are not regulated as fiduciaries when providing investment advice, even though broker-dealer registered representatives and insurance agents often hold themselves out as financial advisors and offer virtually identical services to investors.

<sup>13</sup> FINRA, "Conflict of Interest Report," Oct. 2013, available at <https://www.finra.org/file/conflict-interest-report>.

<sup>14</sup> FINRA, "2015 Examination Priorities Letter," Jan. 6, 2015, available at <http://www.finra.org/sites/default/files/p602239.pdf> ("Conflicts of interest are a contributing factor to many regulatory actions FINRA (and other regulators) have taken against firms and associated persons").

<sup>15</sup> U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, available at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.



their IRAs. Furthermore, a Retirement Investor who moves money out of a 401(k) plan and into an IRA based on conflicted advice can expect to lose 12 to 24 percent of the value of his or her savings over 30 years. Evidence from a wide variety of studies cited by the Department supports the conclusion that these losses are the direct result of Advisers' option to place their own financial interests ahead of the interests of Retirement Investors when offering retirement investment advice.<sup>16</sup>

The evidence of harm to Retirement Investors from a misalignment of interests is evident in examples of conflicted advice reported by CFP® professionals in CFP Board's Senior Exploitation Study, conducted by APCO Insight, in August 2012.<sup>17</sup> The study was conducted to obtain deeper insights and analysis into CFP® professionals' experiences with seniors who have been financially exploited. The study found over half of the CFP® professional respondents (56 percent or nearly 1,500) personally had worked with an older client who previously had been subjected to unfair, deceptive or abusive practices.<sup>18</sup> Of these, 76 percent reported financial exploitation that involved equity indexed or variable annuities.<sup>19</sup>

For example, a California-based CFP® professional reported on a seventy-year-old woman who was repeatedly sold annuity contracts by insurance company Advisers with high commissions of 20 to 25 percent, which would likely exceed reasonable compensation under a fiduciary standard of conduct. Some of the contracts also had twenty-year surrender charges, restricting the client's access to these assets until she was ninety years old. The CFP® professional estimated that this client lost over \$10,000 and, although he helped her remove her assets from the annuity products and write letters of complaint to the insurance companies, he did not expect her to recover any of her lost funds.

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<sup>16</sup> The Investment Company Institute (ICI) and U.S. Chamber of Commerce have both questioned the Department's Regulatory Impact Analysis. At a June 17, 2015 Hearing before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, ICI Chief Economist Brian Reid testified that none of the academic studies that the Department uses addresses the core question of whether an investor's performance is different when his or her Adviser is a fiduciary compared to when his or her Adviser is not a fiduciary and the Department fails to identify and analyze the significant harm to Retirement Investors that is likely to result from the Re-Proposed Rule. It is important to note that the Department sent a letter to relevant industry groups, including ICI, asking for the data needed to perform the Regulatory Impact Analysis; the industry groups responded that the vast majority of the data was unavailable or too expensive to provide. The Coalition believes that because the Department's estimates apply just to mutual fund investments in IRAs, the data likely significantly understate the total cost of conflicted advice related to the other savings vehicles and other financial products.

<sup>17</sup> APCO Insight, *Certified Financial Planner Board of Standards: Senior Financial Exploitation Study*, Aug. 2012, available at <http://www.cfp.net/docs/news-events---supporting-documents/senior-americans-financial-exploitation-survey.pdf?sfvrsn=0>. Research included both a quantitative online survey and qualitative in-depth interviews. CFP® professionals were invited to participate in the online survey via email from CFP Board. From July 24 – August 7, 2012, 2,649 CFP® professionals completed the survey. The theoretical sampling error for the full sample is ±1.9 percentage points at a 95 percent confidence interval.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Variable annuities were included in the FINRA Exam Priorities Letter for 2015 and Secretary Perez has also spoken about the risks to consumers arising from the recommendation of these products. Mark Schoeff Jr., "Perez calls out variable annuities in argument for DOL fiduciary rule," *InvestmentNews*, Jun. 24, 2015, available at <http://www.investmentnews.com/article/20150624/FREE/150629958/perez-calls-out-variable-annuities-in-argument-for-dol-fiduciary-rule>.

The harm to consumers resulting from the misalignment of interests is especially important with respect to retirement assets. Congress enacted ERISA in 1974 to establish special rules to protect Americans' retirement assets in tax-preferred retirement savings vehicles. In doing so, Congress recognized that it was in the public interest to encourage all Americans to save for a secure and dignified retirement.<sup>20</sup> Given the importance of maximizing Americans' retirement assets, Congress intentionally established requirements for financial advice under ERISA that are distinct from and more rigorous than those that apply under insurance and securities laws to non-retirement assets, including the explicit requirement that advice be in the sole interest of the plan and plan participants. The Department's Re-Proposed Rule would close loopholes in its current regulations that allow for conflicted advice by non-fiduciary Advisers related to retirement assets in contravention of Congress' express intent.

**b. Retirement Investors Cannot Easily Identify Fiduciary Advisers**

In addition to a regulatory framework that permits conflicted financial advice by non-fiduciary Advisers, Retirement Investors face additional challenges in the current financial services marketplace. First, consumers are unable to distinguish Advisers who provide fiduciary-level services from those who don't. Second, Advisers exacerbate consumer confusion with marketing and communications practices that do not clearly and openly disclose the standard of conduct under which they are operating or their conflicts of interest.

A landmark 2008 SEC-sponsored study conducted by the RAND Center for Corporate Ethics, Law, and Governance found that "[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility."<sup>21</sup> Subsequent studies confirm persistent and pervasive consumer confusion about financial industry titles and standards of conduct.

A study conducted by InfoGroup, on behalf of the Coalition, Consumer Federation of America ("CFA"), American Association of Retired Persons ("AARP"), and the North American Securities Administrators Association ("NASAA"), found that three out of five U.S. investors mistakenly think that "insurance agents" have a fiduciary duty to their clients; two out of three U.S. investors are incorrect in thinking that stockbrokers are held to a fiduciary duty; and three out of four investors are wrong in believing that "financial advisors" – a ubiquitous term used by financial services and insurance firms to describe their salespersons – are held to a fiduciary duty.<sup>22</sup> The study also

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<sup>20</sup> 29 U.S.C. § 1001 (2012) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.").

<sup>21</sup> Angela Hung, et al., RAND Corp., *Technical Report, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Jan. 3, 2008, available at [http://www.rand.org/pubs/technical\\_reports/TR556.html](http://www.rand.org/pubs/technical_reports/TR556.html).

<sup>22</sup> InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, <http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf>.



found that 75 percent of investors incorrectly believed that the fiduciary standard is already in place for “financial planners.”<sup>23</sup>

A study conducted by Fondulas Strategic Research, on behalf of the Coalition, found significant consumer confusion about the various titles associated with financial planning. A full 82 percent of consumers believe that a “financial planner” is essentially the same as a “financial advisor,” and there is only slightly less confusion between the titles “financial planner,” “wealth manager” and “investment advisor.”<sup>24</sup>

Misleading advertising in the financial services marketplace further exacerbates this consumer confusion. While many Financial Institutions claim that they support a fiduciary standard of conduct and represent their services as unbiased and un-conflicted, their regulatory filings reveal a different truth.

One large financial services firm advertises on its website that their Advisers “recommend unbiased solutions that are in your best interests.” The firm’s Form ADV brochure, however, states that “the differences in compensation create an incentive for financial advisors to recommend products for which they receive higher compensation” and their Advisers have a “conflict of interest based on an incentive to recommend investment products **based on the compensation received, rather than based on your needs.**”

One large insurance firm, presumably to avoid being subject to the fiduciary duty under the current five-part test of ERISA, states in its Form ADV that “[a]ny recommendations provided by your Planner for your IRAs or any retirement plan assets you have the right to self-direct are **not intended to be the sole or primary basis for your investment decisions.**” Additionally, the firm’s code of conduct states that rather than acting in the client’s best interest, Advisers must act in the best interest of the firm.

The alphabet soup of financial service titles – most of which suggest to the consumer that they are receiving advice and not being sold a product – compounded by practices in the marketplace – make it virtually impossible for consumers to identify and choose an Adviser who is obligated to provide advice under a fiduciary standard of conduct. Consequently, consumers who want and would benefit from advice in their best interest are harmed because they cannot identify a qualified fiduciary Adviser.<sup>25</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> Fondulas Strategic Research, *Quantitative Survey: Consumers' Beliefs About Financial Planners*, Jan. 2014 (on file with the Coalition).

<sup>25</sup> CFP Board’s television advertisement in support of its public awareness campaign, known as the DJ ad, further illustrates how easily consumers can be misled. In filming the ad, CFP Board exposed real consumers, who were looking for financial advice, to a DJ who was made over into a “financial planner” and armed with industry jargon. Remarkably, the vast majority of people believed they were meeting with a real financial advisor, and many described him as being knowledgeable, capable and trustworthy. This experiment illustrates the vulnerability of the average consumer and the need for increased investor protection regulations. <http://www.letsmakeaplan.org/if-theyre-not-a-cfp-pro-you-just-dont-know/the-experiment>.

**c. Consumers Want Advice in Their Best Interest and Want the Government to Act to Protect Investors**

It is indisputable that consumers want advice in their best interest and want the federal government to increase regulations to protect them. Consumers believe that all Advisers, regardless of how they are licensed, should be required to act in consumers' best interests. The September 2010 InfoGroup study found that 91% of respondents thought that "a stockbroker and an investment adviser (who) provide the same kind of investment advisory services ... should have to follow the same investor protection rules" and 97% agreed that "when you receive investment advice from a financial professional, the person providing the advice should put your interests ahead of theirs and should have to tell you upfront about any fees or commissions they earn and any conflicts of interest that potentially could influence that advice."<sup>26</sup> Moreover, consumers want the government to play an active role in providing for a level playing field. A March 2013 survey conducted by the KRC Research Group, on behalf of the Coalition, shows that "by an overwhelming margin, Americans want the federal government to play an active role in protecting investors by increasing oversight of [financial] advisers."<sup>27</sup> The survey reflected that 80 percent of investors do not believe the federal government is doing enough to protect "consumers from being taken advantage of" by financial advisors and 84 percent of investors agree that "financial advisors should be regulated by the federal government to protect investors and build confidence in financial services."<sup>28</sup>

It is no surprise that groups that represent large numbers of consumers, including the Consumer Federation of America ("CFA") and the American Association of Retired Persons ("AARP"), enthusiastically support the rule and have provided the Department with hundreds of thousands of signatures of consumers who support the rule.<sup>29</sup>

In short, Retirement Investors face a perfect storm in the financial services marketplace. With ever-increasing responsibility for their own retirements and the need to choose from an increasingly complex set of financial products and services, Retirement Investors more than ever need competent financial advice that is in their best interest. Yet the current regulatory framework allows Advisers' interests to be misaligned with the interests of Retirement Investors; it does not require Advisers to clearly and openly disclose the standard of conduct under which they operate or their actual or potential conflicts of interest; and it permits market practices under which Retirement Investors are simply unable to distinguish Advisers who provide fiduciary-level services from those who do not. As discussed in more detail below, the Department's Re-Proposed Rule will help to correct this regulatory misalignment and marketplace confusion by

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<sup>26</sup> InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, <http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf>.

<sup>27</sup> KRC Research, *Survey: American Investors Want More Protection*, Mar. 8, 2013, available at <http://financialplanningcoalition.com/survey-american-investors-want-more-protection/>.

<sup>28</sup> *Id.*

<sup>29</sup> AARP provided the Department with 31,205 signatures on April 21, 2015. CREDO, MoveOn, Public Citizen and Americans for Financial Reform (AFR), collectively, provided the Department over 230,000 signatures on July 16, 2015.



requiring more Advisers to operate with fiduciary-level accountability when providing advice to retirement plans, plan beneficiaries and IRA owners.

## **II. Expansion of Fiduciary Protection under the Department's Re-Proposed Rule will Help Protect Consumers**

The Coalition supports the Department's proposal to increase ERISA fiduciary-level advice to retirement plans, plan beneficiaries and IRA owners as a much-needed reform to address the misalignment of interests, to reduce confusion in the financial services marketplace and to increase protections for Retirement Investors. The Department's Re-Proposed Rule specifically addresses the misalignment of interests in the marketplace by closing the loopholes in the current five-part test for defining a fiduciary Adviser under ERISA, thereby requiring all Advisers, who provide advice related to retirement assets, to be fiduciary Advisers under ERISA. Requiring fiduciary accountability for all advice related to retirement assets will build in needed protections for Retirement Investors. Fiduciary Advisers will help Retirement Investors navigate complex products and services in the financial marketplace by providing recommendations in their best interests. Requiring all ERISA Advisers to be fiduciaries will also help ameliorate Retirement Investors' inability to identify a fiduciary Adviser and should reduce the current conflicting and confusing marketing and disclosure practices.

Specifically, the Coalition supports the removal of the current requirement that advice be provided "on a regular basis" to trigger a fiduciary obligation under ERISA. The application of full fiduciary protection to one-time advice concerning retirement assets is an important investor protection reform. It ensures that a Retirement Investor, who may go to an Adviser for an important one-time investment decision (e.g., whether or not to distribute assets from an employer-sponsored retirement plan), will receive advice that is in his or her best interest.

The Coalition supports the removal of the "mutual understanding" requirement from the five-part test in the current rule and believes that, when looking at the issue of reliance, the determination should be based upon the reasonable expectation of the Retirement Investor. Because the Re-Proposed Rule would not require a "meeting of the minds" concerning the extent to which a Retirement Investor will actually rely on the advice when making an investment decision, an Adviser will not be able to escape his or her fiduciary obligations by claiming that the advice provided was "solely incidental" to the recommendation or that the advice was not the "primary basis" for the Retirement Investor's decision-making.

The Coalition supports extending the fiduciary standard to advice provided to IRA owners.<sup>30</sup> Requiring advice related to the rollover of assets from employer-sponsored retirement plans to IRAs (including both the initial rollover decision, either from an employer-based plan or existing IRA, and the allocation of assets in the IRA) to be fiduciary-level advice is a much needed investor

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<sup>30</sup> The new proposal fits squarely within the Department's responsibility to regulate advice regarding IRAs, which was established in 1978. Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978). This responsibility was confirmed by Congress in 2006 by the addition of a statutory investment advice exemption to ERISA and the Internal Revenue Code (IRC) through the Pension Protection Act of 2006 ("PPA"). 29 U.S.C. § 1108(g) and 26 U.S.C. § 4975(d)(17), respectively, as added by PPA.

protection reform.<sup>31</sup> For many Retirement Investors, their decision on whether and how to roll over employer-sponsored retirement assets will be the single most important financial decision they will ever make in their lives, with the potential to seriously affect their standard of living in retirement. There are many well-documented abuses concerning these important retirement decisions.<sup>32</sup>

The Coalition also supports the Department's requirement to provide Retirement Investors with a binding and enforceable contract through which they can hold Advisers accountable to provide advice in their best interests. We believe that this provision is an appropriate and necessary enforcement mechanism and that the threat of private action will provide a strong incentive for Advisers and Financial Institutions to meet their fiduciary obligations under the Re-Proposed Rule and to establish policies and procedures to mitigate conflicted advice.

Finally, the Coalition supports the Principal Transaction Exemption as proposed by the DOL. It strikes an appropriate balance between providing Advisers with the opportunity to sell products (for commission-based compensation) from their own inventory and protecting Retirement Investors from conflicted advice. We believe that compliance with the conditions of the exemption will protect consumers from abusive practices, while at the same time not unreasonably narrowing the universe of securities for which the exemption is available.

The Coalition believes that these proposed reforms, which specifically address the misalignment of interests by closing the loopholes in the current five-part test for defining a fiduciary adviser under ERISA that allow for the sale of financial products that may not be in the Retirement Investor's best interest, are a necessary step to help restore consumer trust in the industry by holding Advisers accountable, under a fiduciary standard of conduct, to Retirement Investors for the advice they provide.

### **III. Industry Arguments Against the Re-Proposed Rule are Misplaced**

The Department faces considerable opposition to the Re-Proposed Rule. Interestingly, opponents, primarily from the brokerage and insurance industries, make essentially the same arguments in opposition to the Re-Proposed Rule as they did in opposition to the Original Rule. Opponents raise these nearly identical arguments notwithstanding the significant improvements in the Re-Proposed Rule that were made specifically in response to industry concerns. As discussed in more detail below, the Coalition finds that many of these arguments against the Re-Proposed Rule are simply unsupported, do not accurately reflect the changes in the Re-Proposed

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<sup>31</sup> Advisers often obfuscate fees associated with rollover recommendations and IRAs. FINRA, Regulatory Notice 13-23, *Brokerage and Individual Retirement Account Fees*, Jul. 2013, available at <http://www.finra.org/sites/default/files/NoticeDocument/p304670.pdf> ("Broker-dealers' marketing campaigns often emphasize that fees are not charged in connection with their retail brokerage accounts and IRAs. Nevertheless, while certain types of fees may not be charged, others will be.").

<sup>32</sup> Government Accountability Office, *Labor and IRS Could Improve the Rollover Process for Participants*, GAO-13-30 (Mar. 2013) ("GAO Report") available at <http://www.gao.gov/assets/660/653506.txt>. The GAO Report found that Advisers "encouraged rolling 401(k) plan savings into an IRA even with only minimal knowledge of a caller's financial situation" and that Advisers claimed that 401(k) plans had extra fees and that IRAs "had no fees," or argued that IRAs were always less expensive, notwithstanding the fact that opposite is generally true.



Rule, are inconsistent with our experience in establishing a fiduciary obligation for our stakeholders and members, or are rebutted by reliable research.

**a. The Re-Proposed Rule will Not Drive Advisers Out of Business**

Opponents' claim that the Re-Proposed Rule will drive Advisers out of business. CFP Board heard these same arguments in 2007 when it established a fiduciary standard for CFP® professionals when providing financial planning services. At that time, major firms throughout the country as well as industry organizations representing the brokerage and insurance industries raised significant concerns with CFP Board. They asserted that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a fiduciary standard of conduct.

Contrary to these predictions, the number of CFP® professionals has grown by more than 30 percent to over 72,000 since CFP Board established a fiduciary standard. CFP® professionals, many who work at large firms that represent a cross-section of business models, are now proudly promoting that they deliver fiduciary-level services when providing financial planning.

The Coalition believes that the opponents' argument that Advisers will walk away from providing services to Retirement Investors, who collectively have \$14.4 trillion in 401(k) plans and IRAs, defies credibility.<sup>33</sup> Rather, if our experience in putting the fiduciary standard in place is any indication, Financial Institutions and Advisers will adjust their policies and practices. Additionally, we believe that the Re-Proposed Rule will be a catalyst for innovation in the industry, as Financial Institutions and Advisers will devise new tools and strategies — assisted by modern software and new technology-based tools — to accommodate even those with only a few thousand dollars to invest.

**b. The Re-Proposed Rule is a Workable, Business-Model Neutral Solution that Preserves Consumer Choice**

Opponents also claim that the Re-Proposed Rule is "unworkable" because it will eliminate the broker-dealer and insurance business models. Contrary to this argument, the Re-Proposed Rule and accompanying principles-based PTEs preserve the ability of Retirement Investors to choose how they prefer to pay for retirement advice without requiring them to lose their right to best interest recommendations. The Department crafted a principles-based, business-model exemption — the Best Interest Contract (BIC) Exemption — that provides the terms under which Financial Institutions and Advisers can receive sales-based compensation for advice and still comply with the ERISA fiduciary standard.

Opponents further argue that the BIC Exemption is so unworkable that it, as a practical matter, will force Advisers into a fee-based model. Our collective experience operating under a fiduciary standard of conduct belies that argument. CFP Board and FPA are business-model and

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<sup>33</sup> ICI, "Retirement Assets Total \$24.9 Trillion in First Quarter 2015," Jun. 24, 2015, *available at* [https://www.ici.org/research/stats/retirement/ret\\_15\\_q1](https://www.ici.org/research/stats/retirement/ret_15_q1); see also ICI Research Perspective, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013," Dec. 2014, Vol. 20, Num. 10 (According to the Investment Company Institute, the average 401(k) account balance was \$72,383 at the end of 2013).

compensation-model neutral. CFP Board's *Standards of Professional Conduct* require CFP® professionals, when providing financial planning services, to do so under a fiduciary standard of conduct.<sup>34</sup> CFP® professionals provide fiduciary-level financial planning services under a variety of business and compensation models, including commissioned-based compensation and revenue-sharing models. CFP Board established a Business Model Council for the purpose of working with firms to understand their business models and provide guidance to firms on how their CFP® professionals can comply with the fiduciary standard under different business models. Our experience shows that Advisers can, and many currently do, successfully provide fiduciary-level service under a variety of business models.

While not identical to the BIC Exemption, many of the current requirements of CFP® professionals are similar to proposed requirements under the BIC Exemption: to act in the best interest of the client, to exercise reasonable and prudent judgment, to execute a written contract with the client, to identify and mitigate conflicts of interest between the client and the CFP® professional and the CFP® professional's employer, to provide written disclosures including the full costs of products and services and the compensation to the CFP® professional and/or employer, and to comply with applicable regulatory requirements.<sup>35</sup> These similarities are reflected in the chart below.

	<u>BIC</u>	<u>Analogous CFP Board Rule or Standard</u> <u>(if providing Financial Planning)</u>
Fiduciary	Yes	Rule of Conduct 1.4 - Yes
Written Contract	Yes	Rule of Conduct 1.3 - Yes
Fee/Costs	Point of Sale Disclosure and Annual Disclosure	Rule of Conduct 2.2(A) and Practice Standards 100-1 and 500-1 - CFP® Professional shall disclose accurate and understandable information related to costs and compensation and any material changes to that information
Conflicts	Must Provide Written Notification of Conflicts of Interest	Rule of Conduct 2.2(B) and Practice Standards 100-1, 400-3, and 500-1 - CFP® Professional shall disclose a summary of likely conflicts of interest
Prudent Standards	Yes	Rule of Conduct 4.4 - CFP® Professional shall exercise reasonable and prudent professional judgment
Compliance with Applicable Law	Yes	Rule of Conduct 4.3 - CFP® Professional shall comply with all applicable regulatory requirements
Policies to Mitigate Conflicts	Yes	Rule of Conduct 4.1 - CFP® Professional shall provide professional services with integrity and objectivity

<sup>34</sup> CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4, available at <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct>.

<sup>35</sup> CFP Board *Standards of Professional Conduct*, Rules of Conduct 1.3, 1.4, 2.2, 4.1, 4.3 and 4.4, available at <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct>.



Based on our experience, we believe that Advisers and Financial Institutions are able to establish policies and procedures designed to implement the types of obligations required under the BIC Exemption. This will enable Advisers to continue to provide services under business models that include brokerage and insurance models with commission-based or revenue-sharing compensation arrangements.

**c. The Re-Proposed Rule Will Not Diminish Availability of Services to Middle-Income Americans**

Opponents claim that the Re-Proposed Rule will force Advisers to stop serving middle-income Americans. Opponents' primary support for this oft-repeated assertion is an industry study that is not applicable to the Re-Proposed Rule. In contrast, reliable empirical data, replicated in numerous studies, as well as current practices in the marketplace, demonstrate that a fiduciary duty will not force Advisers to abandon middle-income households and will not leave them without investment advice.

Opponents continue to rely on the Oliver Wyman study that was conducted in April 2011<sup>36</sup> for their assertion that the DOL rule will force Advisers to stop serving middle-income Retirement Investors. This study is premised on the Department completely eliminating commission-based compensation. However, the Re-Proposed Rule specifically permits Advisers to receive commissions for the sale of security and insurance products. The principles-based PTEs broadly permit firms to continue compensation practices typically used by broker-dealer registered representatives and insurance agents with middle-income Retirement Investors, such as commission-based advice and revenue sharing practices, as long as they adhere to basic standards aimed at ensuring their advice is in their clients' best interest.<sup>37</sup>

Research studies that compare fiduciary and non-fiduciary services show just the opposite – that there is no statistically significant difference in the delivery of services to middle-income Americans. A February 2014 study, conducted by Princeton Survey Research Associates International ("PSRAI") on behalf of the Coalition, examined the experience and attitudes of financial advisors who have switched from a suitability standard to a fiduciary standard of conduct

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<sup>36</sup> Oliver Wyman Report, *Assessment of the Impact of the Department of Labor's Proposed "Fiduciary" Definition Rule on IRA Consumers*, (Apr. 2011) (data for Department use submitted Jan. 2012), available at <http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf>.

<sup>37</sup> The Wyman study is further flawed in multiple respects. First, the study relies upon data that is not representative of the industry. For example, in the Wyman study sample, 88 percent of investors have brokerage IRAs, which the study fails to break down into full-service versus discount brokers. However, in the latest Investment Company Institute research from January 2015, only 46 percent of investors have brokerage IRAs (32 percent full-service and 14 percent discount). ICI Research Perspective, Vol. 21, No 1A, Jan. 2015, available at <http://www.ici.org/pdf/per21-01a.pdf>. The study also greatly underestimated the costs to investors by providing only a subset of investors' costs, rather than investors' all-in costs. Davis & Harman, the firm that commissioned the study, admitted that "it was hard to do an apples-to-apples comparison" and it "wasn't feasible to collect and analyze enough data to do an analysis of all-in costs. Ian Salisbury, "Study on Retirement Cost Draws Fire," MarketWatch, Aug. 29, 2012, available at <http://www.marketwatch.com/story/study-on-retirement-costs-draws-fire-1346276514746>. Additionally, as part of its Regulatory Impact Analysis, the Department commissioned the RAND Corporation to provide an independent review of the Wyman study; the independent review found the arguments made by the study to be "unpersuasive." RAND Corp., *Potential Economic Effects on Individual Retirement Account Markets and Investors of DOL's Proposed Rule Concerning the Definition of a "Fiduciary"*, Feb. 2015, available at [http://www.rand.org/pubs/research\\_reports/RR1009.html](http://www.rand.org/pubs/research_reports/RR1009.html).



or who operate under both standards.<sup>38</sup> PSRAI conducted online interviews with a sample of 1,852 advisors drawn from Coalition stakeholders that included a broad representation of various business and compensation models.<sup>39</sup>

Of particular focus in the study were those respondents who switched from a suitability to a fiduciary standard (15%) and those who operate under both a suitability and fiduciary standard in their practice (48%) (hereinafter referred to collectively as “fiduciary respondents”).<sup>40</sup> These advisors offer a more experienced (and arguably a more credible) view of the real impact of transitioning from suitability to a fiduciary standard.<sup>41</sup> Focusing just on the findings related to the availability of services and products and types of clients served,<sup>42</sup> 80 percent of the fiduciary respondents reported an increase or no change in range of services when delivering services to their customers under a fiduciary standard of conduct; 69 percent reported an increase or no change in range of products when delivering services to their customers under a fiduciary standard of conduct; and 72 percent reported an increase or no change in the number of clients served. Broken down by assets, 88 percent reported an increase or no change in clients with \$100,000 - \$999,999 assets under management when delivering services to their customers under a fiduciary standard of conduct, and 59 percent reported no change or an increase in clients with less than \$100,000 assets under management when delivering services to their customers under a fiduciary standard of conduct.<sup>43</sup>

A June 2013 study conducted by the Aité Group, on behalf of the Coalition, compared financial professionals who operated under a fiduciary standard of conduct with those who did not.<sup>44</sup> Among other things, the study examined differences between broker-dealer registered representatives who had a fiduciary practice (i.e., who managed assets as a fiduciary for over half

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<sup>38</sup> Princeton Research Associates International, *Fiduciary Standard Survey*, Feb. 2014, available at <http://financialplanningcoalition.com/>.

<sup>39</sup> Respondents included investment adviser representatives (29%), broker-dealer registered representatives (28%) and dually registered investment adviser/broker-dealer registered representatives (26%). *Id.* at 8. 45% of respondents reported that that clients typically pay through fees; 47% report both commissions and fees; 5% report commissions only. *Id.* at 9. The margin of error at the 95% level of confidence is plus or minus 2.5 percentage points. *Id.* at 8.

<sup>40</sup> *Id.* at 9.

<sup>41</sup> The SEC specifically asked for data on advisers who switched standards. See SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013) at 49. While this study was done with reference to the SEC’s fiduciary rulemaking, respondents’ views on operating under both standards can be informative to the application of the DOL fiduciary rule as well.

<sup>42</sup> The study looked at a many other factors, including the respondents’ views on the fiduciary standard and the impact of extending the fiduciary standard to broker-dealers registered representatives. For example, among those who switched to a fiduciary standard, large majorities reported that the change has been mostly positive for their clients (81%), for their practice (81%) and for them personally (87%).

<sup>43</sup> *Id.* at 18.

<sup>44</sup> *Aité Fiduciary Study Findings*, in the letter from the Financial Planning Coalition, Jul. 5, 2013, to the SEC in response to the SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013), available at <http://www.sec.gov/comments/4-606/4606-3126.pdf>. The Aité Group, a leading third party researcher and data aggregator in the financial services industry, surveyed 498 broker-dealer registered representatives and registered investment adviser representatives who worked in a cross section of firms (wirehouse, bank-affiliated, independent and insurance affiliated broker-dealers, online brokerage, independent RIA firms, and self-clearing firms). The margin of error at the 95 percent confidence level is generally 4 percentage points.



of their client assets and hereinafter referred to as “fiduciary registered representatives”) and other registered representatives. While there were significant differences on many factors,<sup>45</sup> the study found that there was no statistically significant difference between fiduciary registered representatives and other registered representatives in terms of working with mass-market clients (those with less than \$100,000 in investable assets). In fact, the study found that fiduciary registered representatives work with a comparable percentage of mass-market clients to that of other registered representatives.<sup>46</sup>

A July 2012 study by Professors Michael Finke and Thomas Langdon compared the availability of broker-dealer services in the several states that already hold broker-dealer registered representatives to a full fiduciary standard when dealing with all customers, with those states that do not hold broker-dealer registered representatives to a fiduciary standard. The study found “no statistical differences between the two groups in the percentage of lower-income and high-wealth clients, the ability to provide a broad range of products including those that provide commission compensation, [or] the ability to provide tailored advice and the cost of compliance.”<sup>47</sup>

In short, relevant and reliable studies simply do not support opponents’ argument that a fiduciary standard would affect their ability to serve middle-income clients.

Moreover, opponents’ claim is inconsistent with current practices in the marketplace.<sup>48</sup> There are individual Advisers as well as existing and emerging business models that successfully provide low-cost service to middle-income Americans under a fiduciary standard of conduct. Today, there are thousands of CFP® professionals and FPA and NAPFA members across the country who currently provide fiduciary-level services to everyday Americans with business models requiring no or very low minimum assets under management. Additionally, the Department has recognized a number of companies that provide fiduciary-level advice to smaller Retirement Investors.<sup>49</sup> While some Financial Institutions may decide that it is not profitable for them to serve middle-income Retirement Investors under the new requirements of the Re-Proposed Rule, the Coalition believes that, with \$14.4 trillion currently in 401(k) plans and IRAs, there is a strong economic

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<sup>45</sup> *Id.* The study found that the registered investment advisers and the fiduciary registered representatives, who deliver services to their customers under a fiduciary standard, experience stronger asset growth, stronger revenue growth, and obtain a greater share of client assets than the other broker-dealer registered representatives.

<sup>46</sup> *Id.*

<sup>47</sup> Dr. Michael Finke and Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, Journal of Financial Planning, Jul. 2012, available at <https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx>

<sup>48</sup> Opponents’ claim that Advisers who serve lower and middle-income Americans only provide commission-based advice is also not supported by industry data. For Advisers whose core market are investors with less than \$100K AUM, only 24% were commission-only, while 35% were fee-and-commission mix (10% to 50% in fee-based revenue) and 32% were fee-based (greater than 50% to 90% in fee-based revenue). *Cerulli Advisor Metrics 2014: Capitalizing on Transitions and Consolidation*, Cerulli Associates (2014), at 100.

<sup>49</sup> Remarks by U.S. Secretary of Labor Tom Perez at the Brookings Institution, The Hamilton Project, Forum on Promoting Financial Well-Being in Retirement, Washington, DC, Jun. 23, 2015, available at [http://www.dol.gov/sec/media/speeches/20150623\\_Perez.htm](http://www.dol.gov/sec/media/speeches/20150623_Perez.htm). As Secretary Perez noted during the speech, “[w]hen I talk to firms like these and tell them about the argument on the other side — that our rulemaking will make it impossible to serve the small saver — they say: Give those small savers my e-mail address.”

incentive for the vast majority of Financial Institutions to develop new and innovative business models to successfully serve middle-income Retirement Investors.

Finally, the argument that Advisers, who can still receive commissions for their services, can't afford to serve middle-income Retirement Investors if they are required to provide advice that is in the best interests of the Retirement Investor is fundamentally at odds with opponents' rhetoric that they support a best interest standard. Empirical evidence strongly suggests that it is precisely these less wealthy, often less sophisticated investors who are most at risk from harmful practices permitted under the current regulatory framework. Small Retirement Investors, who are disproportionately served by broker-dealers and insurance agents who are not currently required to serve their customers' best interests, are at the greatest risk of receiving conflicted advice that drains their retirement savings.<sup>50</sup>

#### **d. The Re-Proposed Rule Will Not Open the "Floodgates" of Litigation**

Opponents argue that the Re-Proposed Rule will open the "floodgates" for plaintiffs' attorneys to file class-action lawsuits. The significant hurdles associated with class actions will necessarily limit the use of this enforcement tool by Retirement Investors. To be certified, class action plaintiffs must satisfy stringent requirements, including commonality and typicality of facts and/or law across the entire class. These stringent requirements ensure that only those cases where the harm in question is systematic will be certified as class actions. Where the harm is not systematic, because there are differences in the facts or law for each potential claimant, then a class action will not be certified.

In fact, arbitration, not class actions, will likely be the enforcement mechanism that Retirement Investors will most likely use to enforce the BIC Exemption. The Department has permitted Financial Institutions to continue to require mandatory pre-dispute arbitration clauses in Retirement Investors' contracts. These arbitration proceedings will most likely be conducted by FINRA, a dispute resolution forum very familiar to Financial Institutions and Advisers.

Many Advisers currently operate under the ERISA fiduciary standard and there is no evidence that has been put forth by opponents that those Advisers are dealing with increased litigation risk. In fact, adherence to a fiduciary standard of conduct could reduce litigation risk. In a January 2015 letter to its members, FINRA stated "firms best serve their customers — and reduce their regulatory risk — by putting customers' interests first. This requires the firm to align its interests with those of its customers."<sup>51</sup> The Coalition believes that when Advisers and Financial Institutions take seriously their obligation to mitigate conflicts and put the interests of their customers first,

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<sup>50</sup> Dr. Michael Finke, *Fiduciary Standard: Findings From Academic Literature*, attached to the letter from IMCA, Jul. 5, 2013, to the SEC in response to the SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013), available at <http://www.sec.gov/comments/4-606/4606-3121.pdf> (Dr. Finke reviewed a number of academic studies related to the potential benefits to consumers of a fiduciary standard, including studies showing that less sophisticated and less wealthy investors are most likely to suffer the harmful consequences of recommendations that are not based on the best interest of the investor.).

<sup>51</sup> FINRA, "2015 Regulatory and Examination Priorities Letter," Jan. 6, 2015, available at <http://www.finra.org/sites/default/files/p602239.pdf>.



they should see their liability risks reduced as a result of the better outcomes they achieve for clients.

**e. The Benefits to Retirement Investors Far Outweigh the Costs to Financial Institutions to Implement Reforms Required by the Rule**

Opponents of the Re-Proposed Rule contend that the costs to the industry to implement the rule are too onerous and that Advisers and Financial Institutions will pass these costs on to their clients. However, the opponents focus only on the costs to the industry, rather than focusing on the immense quantitative and qualitative benefits to Retirement Investors of advice that is in their best interest.

The Department recognizes that there will be costs to Financial Institutions and Advisers associated with implementation of the Re-Proposed Rule. In its Regulatory Impact Analysis, the Department estimates that the compliance costs associated with the Re-Proposed Rule will total between \$2.4 billion and \$5.7 billion over 10 years.<sup>52</sup> The Coalition is proposing rule modifications that are intended to reduce the anticipated costs to Financial Institutions and Advisers. Moreover, the Department has already indicated that it is looking at ways to modify the Re-Proposed Rule to reduce costs. However, even assuming no cost reductions, the Coalition believes that the costs of conflicted advice to Retirement Investors under the current regulatory framework greatly outweigh the costs to the financial services industry to implement and to comply with the Re-Proposed Rule.

As noted above, based upon a wide range of independent studies, the Department estimates that, *for mutual fund investments in IRAs alone*, investors will lose between \$210 billion and \$430 billion over 10 years, and between \$500 billion and \$1 trillion over 20 years as a result of conflicted advice. Furthermore, according to the Department's analysis, a Retirement Investor who moves money out of a 401(k) plan and into an IRA based on conflicted advice can expect to lose 12 to 24 percent of the value of his or her savings over 30 years.<sup>53</sup>

The Department also estimates that the Re-Proposed Rule may result in gains of between \$40 billion and \$44 billion over 10 years for these IRA Retirement Investors. The potential gains to the entire retirement market are likely to be significantly greater. However, if only 75 percent of anticipated gains to IRA investors were realized, that would amount to between \$30 billion and \$33 billion over 10 years. If only 50 percent were realized, that would total between \$20 billion and \$22 billion over 10 years. Even under the most conservative estimates, therefore, the benefits to Retirement Investors of best interest advice are many times greater than the costs to industry to implement and to comply with the Re-Proposed Rule.<sup>54</sup>

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<sup>52</sup> U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, available at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

**IV. The Re-Proposed Rule Reflects a Balanced Approach that Preserves Various Business Models While Ensuring that Retirement Investors Will Receive Advice that is in Their Best Interest**

The Department clearly listened to many of the concerns articulated by firms, industry organizations and consumer and public interest organizations in response to the Department's 2010 Original Rule and the Department has repeatedly assured all parties that it will do the same with the Re-Proposed Rule. The Department has been clear that it plans to use the comment period to make further refinements to address industry concerns while maintaining critical protections for Retirement Investors. The Department has repeatedly assured Congress and all interested parties (including Financial Institutions, industry organizations, and consumer and public interest organizations) that it welcomes their recommendations in order to promulgate a final rule that is workable across business models.

To assist the Department in promulgating a rule that is workable across business models, the Coalition devotes the remainder of its comment letter to identifying areas where we believe the Re-Proposed Rule can be clarified or improved to allow for a more practical application of the fiduciary standard to various business models.

**a. Coalition Supports the Proposed Revisions of Definition of “Fiduciary Adviser” Under ERISA with Suggestions for Modifications**

Under the Department's re-proposed definition, any individual receiving compensation for providing advice that is individualized or specifically directed to a particular plan sponsor, plan participant, or IRA owner for consideration in making a retirement investment decision is a fiduciary. As noted above, the re-proposed definition closes loopholes in the current five-part test, where many Advisers have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules.

**i. Mutual Understanding**

The Coalition understands and agrees that under the proposed definition of “investment advice,” a mutual understanding between the parties that the advice will serve as the primary basis for plan decisions should no longer be required. In the future, fiduciary status should rest on four criteria: (i) an understanding by the recipient (ii) that advice may be either individualized or specifically directed to the recipient (iii) for consideration by the recipient in making investment decisions for the applicable plan or IRA and (iv) will come within one of the four listed categories of recommendations.

However, the Coalition believes that the applicable language in proposed 29 CFR § 2510.3-21(a)(2)(ii) may need to be revised, since it could be interpreted as requiring a “meeting of the minds” as provided under the current regulations. The Department should make clear that a meeting of the minds is not required. We recommend that this requirement be amended to clarify that it can be met by reliance or an understanding by the recipient that the advice is individualized or specifically directed to the recipient. We believe that when looking at the issue of reliance, the determination should be based upon the reasonable expectation of the Retirement Investor.



## **ii. Pre-Contract Communications with Retirement Investors**

The Re-Proposed Rule states that a written contract to trigger the BIC Exemption must be entered into prior to a recommendation “as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including recommendations to receive a distribution of benefits or roll over assets from a plan or IRA.” The Coalition understands that the intention of the Re-Proposed Rule is to protect Retirement Investors; however, the Rule is unclear whether initial discussions, during which an Adviser is marketing or promoting his or her services to prospective Retirement Investors, constitute Covered Advice.

It is important for the Department to explicitly recognize that certain marketing and promotion activities must be allowed before a fiduciary relationship arises. The Coalition requests clarification that initial discussions, during which an Adviser is marketing or promoting his or her services, do not constitute Covered Advice. While the line between initial marketing communications and Covered Advice may at times be difficult to determine and may require a “facts and circumstances” analysis, we believe that the Department can provide broad guidelines and examples to help clarify the types of communications that constitute marketing and not Covered Advice.

Broadly speaking, Covered Advice should include advice that is individualized to or specifically directed to the recipient for consideration in making an investment or investment management decision. This broadly includes recommendations that are provided to address the objectives or needs of a client after taking into account the client’s specific circumstances. Covered Advice should include, for example:

- Communications that contain recommendations to purchase or sell investment products;
- Communications about investment products that encourage clients to purchase or sell investment products as well as communications that encourage clients not to purchase or sell investment products;
- Communications that contain recommendations of a particular investment or allocation strategy directed to the client or intended for the client’s consideration in making investment or allocation decisions; and
- Technology that makes specific recommendations to users based on the users’ financial information.

On the other hand, communications that do not make recommendations that are individualized to or specifically directed to the recipient for consideration in making an investment or investment management decision or otherwise promote a product or service of the Adviser or Financial Institution should not be considered Covered Advice. These types of marketing communications could include, for example:

- Discussing general investment and allocation strategies without reference to specific products;

- General marketing materials that are not targeted to a specific customer or group of customers; or
- Promoting the Adviser's range of services.

While we believe that further clarification and guidance from the Department will be helpful, it cannot address with specificity all the types of communications and business activities that may constitute either Covered Advice or marketing communications. In addition, Advisers may, as a practical matter, need to provide recommendations that constitute Covered Advice prior to being able to execute a contract. To provide additional flexibility to Advisers to engage in pre-contract communications with Retirement Investors while ensuring protection of the Retirement Investor, we propose that the Department make clear that if a client is given advice prior to the execution of a contract, all the protections contained in the BIC Exemption, including the obligation to provide advice that is in the best interest of the client, apply retroactively to the advice.<sup>55</sup>

### **iii. Implementation and Enforcement Dates of Re-Proposed Rule**

The Department has indicated that once the Re-Proposed Rule is finalized, there will be a delayed implementation date of eight months. The Coalition strongly supports setting a tight implementation date given the immediate need for protection of Retirement Investors. However, the Coalition is concerned that eight months will not allow Financial Institutions and Advisers sufficient time to adjust compensation arrangements, to adopt new required policies and procedures, and to prepare necessary disclosures required under applicable exemptions, including, but not limited to, the BIC Exemption, discussed below. This concern is based upon the previous experience of CFP Board in implementing its own fiduciary standard, where CFP Board established an enforcement date that was six months after the implementation date.

The Coalition suggests that the Department either retain the eight-month implementation date for the Re-Proposed Rule or allow a limited extension to no more than 12 months after the final rule is published. The Department should require Financial Institutions and Advisers to establish policies and procedures that reflect reasonable, good faith compliance with the new regulations upon the implementation date. To allow flexibility for full implementation of all the requirements of the Re-Proposed Rule, the Coalition further suggests that the Department consider establishing phased-in enforcement deadlines for certain specific requirements, which may take additional time to implement. For requirements under the BIC Exemption that may need additional time to fully implement (e.g., disclosure and recordkeeping requirements), the Department could approve the use of "contractual triggers" that would phase-in certain requirements after the date of the contract. Should the Department allow for phased-in requirements, the Coalition recommends that this flexibility should not extend to the fundamental obligation to serve the best interest of the client and that all requirements must be fully implemented and enforceable by no later than one year after the implementation date of the final rule.

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<sup>55</sup> See discussion *infra* Part IV.c.i.4.



**b. Coalition Supports the Proposed Carve-Outs from the Definition of What Constitutes “Fiduciary Investment Advice” Under ERISA**

While substantially broadening the scope of the fiduciary regulation through the Re-Proposed Rule, the Department provides certain “carve-outs” that allow persons who may otherwise be deemed investment advice fiduciaries to be exempt from fiduciary status. The Coalition agrees that a majority of these carve-outs preserve certain common business practices within the retirement services industry for which fiduciary protections are not needed.

**i. General Education Carve-Out**

The Coalition believes it is vitally important that the Department encourage generalized education and information about financial concepts (e.g., asset classes, asset allocation, etc.). The Re-Proposed Rule carefully carves out education from the definition of retirement investment advice so that Advisers and plan sponsors can continue to provide general education on retirement saving across employment-based plans and IRAs without triggering fiduciary duties. Studies regularly show that the “financial literacy” of many Americans is much lower than needed to make well-informed financial decisions.<sup>56</sup> The Coalition appreciates that the Department makes clear that generalized educational and informational materials, which clearly disclose that such materials are not tailored to a specific customer’s financial situation, do not by themselves establish fiduciary status in any plan context.

The Re-Proposed Rule includes an education carve-out that allows for the use of allocation models, but would not allow for models to be populated with specific investment options. This current industry practice has been developed to meet requests from plan participants for guidance related to proper investment selection. However, the Coalition recognizes that providing this limited educational assistance may cross a line into providing back-door advice and understands why the Department has proposed this provision in the Re-Proposed Rule. Nonetheless, the Coalition respectfully suggests that the education carve-out as proposed be expanded to allow models to be populated as long as all of the investment options available to plan participants and IRA owners in a certain asset class are included. For example, if there are three funds that would be categorized as bond funds, all three can be listed in the allocation model and the carve-out would still apply. If there is only one fund in an asset class, the carve-out would also still be available. The Coalition recognizes that this suggested change would have greater application in the employer-sponsored retirement plan context, where a selection of core investment options is usually limited to between six and forty funds.

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<sup>56</sup> Financial literacy is especially important with regard to fees. For example, a 2012 study of 7,500 U.S. households by Cerulli Associates, in conjunction with Phoenix Marketing International, found that nearly two-thirds of investors either believed the advice they received was free (29 percent) or did not understand how the Adviser was paid (31 percent). *Cerulli Quantitative Update: Retail Investor Advice Relationships*, Cerulli Associates (2012), at 224. Even with the heightened focus on financial literacy, the more recent 2014 study found that over half of investors still either believed the advice they received was free (26 percent) or did not understand how the Adviser was paid (25 percent). *Cerulli Quantitative Update: Retail Investor Advice Relationships*, Cerulli Associates (2014), at 22.

**c. Coalition Supports the Department's Principles-Based Approach to Prohibited Transaction Exemptions (PTEs) Under ERISA with Requests for Clarification and Proposed Language to Allow for a More Practical Application of the Fiduciary Standard to Various Business Models**

The Coalition supports the Department's new broad, principles-based PTEs that can accommodate a range of evolving business models, while preserving a strong fiduciary standard. We agree with the Department that the principles-based approach to PTEs streamlines compliance and gives Financial Institutions and Advisers the flexibility to determine how to serve Retirement Investors' best interest.

**i. Best Interest Contract (BIC) Exemption**

The Coalition supports the BIC Exemption. We believe it is a flexible, adaptable, business-model neutral approach to the application of the fiduciary duty under ERISA that will balance a number of competing interests. It will preserve a strong principles-based fiduciary standard while at the same time allow compensation models that will facilitate the delivery of services to middle-income Retirement Investors by placing the burden on Financial Institutions and Advisers to commit to putting their clients' best interest first and to establish appropriate policies and procedures to mitigate conflicted advice.

The exemption places the burden of making a determination regarding whether the compensation is reasonable on the Financial Institution and Adviser, not on the Retail Investor. Additionally, as noted above, by allowing commissions under the BIC Exemption the Department has rendered the findings of the 2011 Oliver Wyman Study, which were based on the assumption that commissions would be eliminated, irrelevant.

**1. Exclusion of Small Participant-Directed Plans**

The BIC Exemption would provide relief to fiduciary Advisers who earn variable compensation from retail Retirement Investors, such as plan participants and IRA owners, as well as sponsors of non-participant-directed plans with less than 100 participants, such as small defined benefit plans. We note that sponsors of small 401(k) plans and other small plans with participant-directed investments are omitted.

The Coalition urges the Department to extend the BIC Exemption to cover small, participant-directed plans. If this relief is not provided, Advisers may be unable to earn variable compensation when selling investments to sponsors of these small plans. The Coalition views this as an unjustified anomaly, given that the BIC Exemption is intended to cover retail retirement clients, including the participants in such small plans.

The extension of the BIC Exemption would prevent contraction of this market and ensure the continued availability of advisory services to small plans. Moreover, the extension of the BIC Exemption to small participant-directed plans would address the dilemma faced by platforms maintained by financial advisors that would normally provide assistance in selecting a menu of investment options for a 401(k) plan. These platform providers cannot qualify under the platform provider carve-out, because their advice would be directed to the specific needs of the plan, and



the BIC Exemption, as currently proposed, would be unavailable to provide relief from ERISA's prohibited transaction rules. Under these circumstances, many platform providers may feel compelled to leave plan sponsors to their own devices in selecting a plan investment menu. The Coalition believes that this especially vulnerable group needs to have as many forms of assistance available to it as possible, as long as appropriate standards — such as those established under the BIC Exemption — are in place.

## **2. Exclusion of Certain Assets from BIC Exemption**

The Department's Re-Proposed Rule limits availability of the BIC Exemption to certain listed investment products. These products include bank deposits and CDs, mutual funds, exchange-traded funds, bank collective investment funds, insurance company separate accounts, exchange-traded REITs, corporate bonds available under registered offerings and equity securities that are publicly traded. Also included are Treasury and agency debt securities, insurance and annuity contracts, and guaranteed investment contracts (GICs).

Noticeably, this list does not include privately placed debt securities, non-traded REITs or alternative investments, such as hedge funds and private equity. Although the Coalition recognizes that such investments are being increasingly used by small plans such as defined benefit plans, we strongly support the Department's proposed limitation on investments that qualify for the BIC Exemption. The Department's analysis of such investments shows that they comprise only four percent of the retirement marketplace and that there may be valuation and/or liquidity issues that could arise. It is our position that if a provider wants to offer such investments to retail Retirement Investors, they can do so (1) under a compensation model that does not involve conflicted advice; or (2) by seeking an individual PTE from the Department to cover their proposed investment product.

## **3. Application of BIC to Rollover Advice by AUM Adviser**

Under the Department's Re-Proposed Rule, covered recommendations relating to investments in securities or other property will include recommendations to take rollovers from a plan, as well as investment recommendations for rollover assets. Further, the proposed definition also includes recommendations relating to the investment management of the assets of a plan or IRA, including rollover assets. In CFP Board's experience, which includes investigation and discipline arising from complaints against its CFP® professionals, some of the greatest abuses have involved conflicted advice to plan participants to take a lump sum distribution from an employer sponsored retirement plan. Therefore, the Coalition sees this expansion of fiduciary investment advice, to include advice given in relation to IRAs, to be an important and necessary protection for Retirement Investors.

Generally speaking, Advisers who charge fees for services, including assets under management, a flat retainer, a project fee or an hourly fee do not receive variable compensation for their advice and thus do not generally need the protection of a PTE to provide advice under ERISA (hereinafter these fee structures are referred to as "non-variable compensation").

However, the Coalition believes that in a very limited circumstance – when an Adviser who is being paid a percentage of assets under management makes a rollover recommendation that would increase the Adviser's assets under management – this would be considered conflicted advice that would trigger the need for a PTE for that limited advice. This would include rollover advice to a participant or IRA owner, including advice to roll over assets from an employer-based plan to an IRA or roll over assets from an existing IRA to a new IRA where the advice results in an increase in assets under management. Given that an Adviser, who is compensated by assets under management, is generally subject to the requirements of a fiduciary duty under securities law and regulation,<sup>57</sup> the Coalition respectfully requests that the Department consider a streamlined sister exemption to the BIC Exemption applicable to this limited circumstance (For convenience, we are referring to this proposed exemption as the "AUM Adviser Rollover Exemption").

The Coalition proposes that this exemption be available to an Adviser who charges asset based fees that meet the fee leveling test under 29 CFR § 2550.408g-1(b)(3)(D).<sup>58</sup> Under this streamlined exemption, the Department could require the Adviser to meet only a certain subset of the requirements of the BIC Exemption. We propose that these include (1) a written contract (as further described below with suggested changes), (2) the Best Interest Standard requirement, and (3) the required disclosures. We do not believe the remaining requirements of the BIC Exemption would be needed to protect Retirement Investors including, but not limited to, the development of policies and procedures to mitigate conflicted advice, the creation of a website and the recordkeeping obligations. The Coalition notes that its proposal to create a sister exemption that shares a subset of requirements is similar to the approach taken in 29 CFR § 2550.408g-1.

The Coalition again notes that this proposed AUM Adviser Rollover Exemption would only apply to and be needed for the limited Covered Advice of providing advice to a participant or IRA owner to roll over assets from an employer-based plan or an existing IRA to a new IRA. The AUM Adviser will no longer need to rely on a PTE to provide investment advice regarding the investment or

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<sup>57</sup> In *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007), the DC Circuit vacated SEC's proposed Advisers Act Rule 202(a)(11)-1, which provided, among other things, that fee-based brokerage accounts were not advisory accounts and thus were not subject to the Advisers Act. Subsequent to the court's decision, the SEC has provided interpretive, but not final, guidance reflecting that broker-dealers offering fee-based brokerage accounts are subject to the Advisers Act with respect to those accounts. See Interpretive Rule under the Advisers Act Affecting Broker-Dealers, Advisers Act Rel. No. 2652 (Sept. 24, 2007) ("Release 2652") (The SEC has "long held the view that when a broker-dealer charges its customers a separate fee for investment advice, it clearly is providing advisory services and is subject to the Advisers Act"); see also Opinion of General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 2 (Oct. 28, 1940) ("a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the [Advisers] Act merely because he is also engaged in effecting market transactions in securities").

<sup>58</sup> Advisers may meet the fee leveling test as long as no "fiduciary adviser (including any employee, agent, or registered representative) that provides investment advice receives from any party (including an affiliate of the fiduciary adviser), directly or indirectly, any fee or other compensation (including commissions, salary, bonuses, awards, promotions, or other things of value) that varies depending on the basis of a participant's or beneficiary's selection of a particular investment option."



management of assets once inside the IRA because such ongoing advice would not result in variable compensation and therefore would not be considered conflicted advice.

#### **4. Execution of BIC Exemption – Operationalize for Various Business Models – New and Existing Clients**

One of the central requirements of the BIC Exemption is a written agreement between the Adviser, Financial Institution and the Retirement Investor. The agreement must contain certain mandatory provisions and warranties. For example, under the terms of the agreement, the Adviser must acknowledge that it is a fiduciary for purposes of ERISA or the IRC, as applicable, with respect to the advice that is provided. Further, the agreement must incorporate the “impartial conduct standards” as defined under the BIC Exemption. In order to meet the written contract requirement, the proposed regulation requires an Adviser and Financial Institution to “enter into a written contract” with a Retirement Investor prior to the Adviser making a recommendation. The preamble to the BIC Exemption states this requirement somewhat differently and notes that “[t]he contract must be executed” by the Adviser, Financial Institution and the Retirement Investor, before the recommendation occurs. However, the Coalition has a number of concerns with the contract requirement as proposed.

First, the Re-Proposed Rule should include a requirement that the contract incorporate language to bind all parties who have provided Covered Advice to the Retirement Investor, which would include the Financial Institution, the Adviser, the call center Adviser, any former Adviser, and an Adviser’s team member(s). This requirement will ensure the right of Retirement Investors to hold past and present fiduciary Advisers accountable for providing advice in their best interest through a private right of action for breach of contract.

Second, the contract requirements under the Re-Proposed Rule should be tailored for the type of client. For existing clients, the Coalition recommends that the Department recognize that notification by a Financial Institution of the new legally binding obligations required by the BIC Exemption meets the execution requirement for the contract, without the need for a client signature. In other words, the Department should make clear that the BIC Exemption allows for negative consent to create legally binding protections under the contract flowing from the Financial Institution / Adviser to the client.

For new clients, the Coalition recommends that the Department build in flexibility with regard to the timing of the execution of the BIC contract to allow for client execution of the contract at the same time the client is required to sign an engagement or account opening agreement. These touch points for client signatures will vary based on the business model. To allow for flexibility but still protect the Retirement Investor, we propose that the Department make clear that if a new client is given advice prior to the execution of the contract, all the protections contained in the BIC Exemption, including the obligation to provide advice that is in the best interest of the client, apply retroactively to the advice.

The Coalition proposes the following examples for touch points where a new client’s signature may be obtained in a manner that reduces the administrative burden on Financial Institutions and Advisers:

For CFP® professionals providing financial planning services and receiving variable compensation, the client's signature can be obtained when the client signs the financial planning services agreement.<sup>59</sup> The financial planning services agreement specifies: the parties to the financial planning services agreement; the date of the financial planning services agreement and its duration; how and on what terms each party can terminate the financial planning services agreement; and the services to be provided as part of the financial planning services agreement. The Adviser can include the required BIC exemption provisions in this agreement.

For broker-dealers and broker-dealer registered representatives, the client's signature can be obtained when the client opens his or her brokerage account. When the client opens a brokerage account, he or she must sign an account opening agreement. The account opening agreement will generally require the client to make decisions including: who will make the final decisions about what the client buys and sells in the account; how the client will pay for investments; and how much risk is the client comfortable taking. When opening a new account, the Financial Institution will also likely ask the client to sign a legally binding contract to arbitrate any future dispute between the client and the Financial Institution or Adviser. The Financial Institution can include the required BIC exemption provisions in this account opening agreement.

For insurance agents, the client's signature can be obtained when the client submits his or her annuity or life insurance (collectively "insurance") contract application. When the client applies for insurance, he or she must sign an insurance contract. The insurance contract generally includes: the specific details of the contract, such as the structure of the insurance product being sold; payment provisions (how the investment will operate and when the periodic payments will be made); and any penalties for early withdrawal (in the case of an annuity). The Financial Institution can include the required BIC exemption provisions in the insurance contract.

Third, the Coalition recommends that the Department consider tailoring its contract execution requirements to accommodate certain types of business models. For example, the Coalition believes that it may be impractical to require call center Advisers to put in place an executed contract prior to providing assistance to plan participants or prospective clients, which can include potential advice (e.g. regarding rollovers). Contract execution requirements customized for call center business models could include (1) a requirement that only the Financial Institution needs to execute a contract with a new client; (2) that any call center Adviser who provides Covered Advice to the Retirement Investor is covered by that contract; and (3) that the contract retroactively includes any Covered Advice that may have been provided by the call center Adviser prior to the execution of the contract.

## **5. Fee Structures that Meet the BIC Exemption Warranty**

Under the BIC Exemption, the Adviser wanting to meet the BIC Exemption must, among other things, warrant that it has adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest. The Coalition strongly supports the

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<sup>59</sup> See CFP Board *Standards of Professional Conduct*, Rules of Conduct 1.3 and 2.2(E), available at <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct>



Department's proposed principles-based approach that provides Advisers with the flexibility to design policies and procedures that are specifically tailored to their business models. The principles articulated by the Department (e.g. "best interest," duties of "prudence" and "loyalty," and "reasonable compensation") are all concepts that are well established in ERISA jurisprudence.

Opponents of the Re-Proposed Rule have charged that as a practical matter, level fee structures are required to satisfy the warranty despite the Department's assurances in the Preamble to the Re-Proposed Rule that level fee structures are not required. For example, the Department specifically allows for variable compensation based upon neutral factors, such as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments. For example, a Financial Institution could compensate an Adviser at different levels for advice related to the purchase of an annuity product versus a mutual fund based on the different level of complexity of the products, time to research the products and time to explain the products to the client.

The Department mandates that Financial Institutions "contractually warrant that [they have] adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors." The Coalition believes that this offers Financial Institutions latitude to adopt policies and procedures designed to mitigate conflicts that can work within various business models and offers the examples below as policies that would not necessarily require a level fee structure:

- Prohibit the use of quotas, appraisals, performance or personnel actions, bonuses, contests, special awards or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the best interest of Retirement Investors.
- Utilize an asset allocation model designed by an independent third party consultant for use by Advisers.
- For product categories that are similar, develop a range of compensation amounts that the Financial Institution deems to be "reasonable compensation" based on acceptable ranges within the industry for the product category. Products can be clustered for determining the range of reasonable compensation by type, level of complexity, level of research/explanation required, risk factors, etc.
- Refrain from providing higher compensation, or providing other rewards, for the sale of proprietary products or products from providers with which the firm has entered into revenue-sharing agreements.
- Restrict differential compensation to the Financial Institution level, with strict "Chinese wall" separation between firm-level and Adviser-level compensation such that there is no opportunity for an Adviser's recommendations to be influenced by differential compensation flowing to the Financial Institution.

- Avoid compensation thresholds where an Adviser can increase his or her compensation disproportionately after reaching a certain threshold of sales. In the context of compensation grids, paying an Adviser a higher percentage of gross revenue may legitimately reward hard work and encourage higher productivity. A conflict is created, however, if an Adviser's desire to move to a higher payout level influences the number or type of recommendations he makes to customers.
- Link supervision and surveillance of Advisers' recommendations to thresholds in a firm's compensation grid structure. This can enable firms to detect recommendations, or potential churning activities that may be motivated by a desire to move up in the grid structure and, thereby, receive a higher payout percentage.
- Develop a surveillance program to identify spikes in Advisers' sales of a particular product, so that if a significant increase is discovered, an analysis can be conducted regarding recommendations of that product.
- Decline to offer products where Advisers and Financial Institutions cannot effectively mitigate conflicts arising from product.
- Use red flag processes and clawbacks to penalize employees for not properly managing conflicts of interest:
  - Red Flags: Develop metrics for bad behavior (red flags), assess employee performance against those metrics, and base compensation decisions on that performance.
  - Clawbacks: Include a contractual clause that allows a firm to revoke some or all of an employee's deferred compensation, in some cases including vested compensation.

## **6. Disclosure Obligations to the Retirement Investor**

Under the BIC Exemption, the Financial Institution and Adviser must provide a series of disclosures including specific contractual, point of sale, annual, and website disclosures. The Coalition fully supports the contractual and annual disclosure requirements. These are reasonable and appropriate requirements that provide the Retirement Investor important protections and needed transparency related to the costs paid by the Retirement Investor and compensation received by the Financial Institution and Adviser.

However, the Coalition is concerned that components of the point of sale and website disclosures are overly burdensome and that the benefits of some of these disclosure requirements to the Retirement Investor may not justify the cost. The Coalition urges the Department to identify the disclosure requirements that can be removed from the BIC Exemption while still providing the Retirement Investor with information that is vitally needed about costs and services. As such, the Coalition suggests the following amendments to the proposed rule.

**Point of Sale Disclosure:** The Coalition fully supports the requirement that the “total cost” of investing in an asset be disclosed to the Retirement Investor at the point of sale. It is particularly important for the Retirement Investor to fully understand all the costs, direct and indirect, particularly those that will reduce the amounts received by the Retirement Investor.<sup>60</sup> However, the Coalition is concerned that requiring the “total cost” for the 1-, 5-, and 10- year periods, using reasonable assumptions about investment performance, raises a number of issues. While projected costs may be available in the mutual fund context,<sup>61</sup> it may be much more difficult with respect to other investment products. We believe that projections concerning investment performance would not be useful to Retirement Investors if they were based on many caveats or grossly understate performance. For these reasons, FINRA rules prohibit the projection of future investment performance, including that investment performance illustrations must not imply that gain or income realized in the past will be repeated in the future.<sup>62</sup>

Given the difficulties involved in projecting investment performance, the Coalition suggests that the Department limit this disclosure requirement to information that is known or reasonably known at the time of the transaction. If the Financial Institution obtains updated information, it will have an obligation under the annual disclosure requirements to disseminate such information to the Retirement Investor. Moreover, we recommend that the point of sale disclosures should rely on information available from objective third-party providers of independent investment research rather than on proprietary information developed by the Financial Institution that has the potential for conflicts of interest.

**Website Disclosure:** The Coalition is concerned that the website disclosures required in the Re-Proposed Rule may be overly broad and not needed for full disclosure of costs to the Retirement Investor. The rule would require website disclosure of all direct and indirect compensation that the Adviser may obtain on every Asset as well as disclosure in machine-readable format of all direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate.

The Coalition recommends that the Department modify these requirements to remove the disclosure requirements for Adviser-level compensation. Publication of this type of information is not needed by Retirement Investors, who are already being provided with their Advisers’ compensation. At the same time it could be used by competitors in ways that are damaging to Financial Institutions and Advisers. Instead, the type of information that should be disclosed on the publicly available website should be the type that would allow investors the opportunity to engage in comparison shopping across Financial Institutions by identifying the range of products

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<sup>60</sup> Other important disclosures include: name of product/recommendation; purpose of product/recommendation; stated charges of the product if readily available; advantages and disadvantages of product/recommendation based on the client’s goals and objectives; surrender charges that may exist and for how long; and the liquidity of product/recommendation.

<sup>61</sup> Mutual fund prospectuses provide 1-, 5-, and 10- year costs, but are based upon a static return. For example, the Vanguard 500 Index Fund summary prospectus provides a cost projection based upon a 5% return each year. See Vanguard, Vanguard 500 Index Fund Summary Prospectus, Apr. 28, 2015, *available at* <https://personal.vanguard.com/pub/Pdf/sp40.pdf?2210099878>.

<sup>62</sup> FINRA Rule 2210(d)(1)(F), *available at* [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=10648](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648).



offered and by disclosing the range of compensation within the assets and the asset classes offered.

#### **7. Reliance on Home Office for Disclosure**

Among other things, the written contract required by the BIC Exemption must include various warranties from the Adviser. The Adviser must warrant that it will comply with all federal and state laws. It must also warrant that the Financial Institution has adopted compliance policies reasonably designed to mitigate conflicts of interest and that it has eliminated any incentives that would encourage Advisers to make recommendations that are inconsistent with the best interest fiduciary standard. Importantly, a huge amount of financial and investment performance information must be disclosed along with maintenance of a website. Compliance would be extremely difficult for an individual Adviser, even one associated with a large advisory or consultative practice.

The Coalition suggests that the Department consider amending these extensively detailed requirements to allow individual Advisers to reasonably rely on documentation prepared by their broker-dealer, platform or custodian without penalty if the details of the contract or investment disclosures are made in good faith but contain minor deficiencies. The Adviser would still be held to the standards outlined in the warranties, as would the home office.

#### **8. Department's Public Notice of BIC Exemption**

Under the BIC Exemption, a one-time notice must be filed with the Department before an Adviser or Financial Institution may receive any variable compensation based on the proposed relief. The filing does not need to identify the Financial Institution or Adviser's plan clients or IRA clients, and does not need to be approved by the Department. While there is no substantive approval process or waiting period once the notice is filed, the Coalition is concerned that the process does not entail any acknowledgement by the Department that the filing has been made, or any public transparency regarding which entities are relying on the BIC Exemption. Accordingly, the Department should establish a publicly accessible registry where filings can be electronically verified and viewed. This would allow Advisers to electronically verify and review their submission as received by the Department and would also have the added benefit of providing transparency to the public that may utilize their services.

#### **9. Recordkeeping Obligations**

Under the Re-Proposed Rule, Financial Institutions must maintain, and upon request, disclose to the Department, information related to inflows, outflows, holdings, and returns for six years from the date of a transaction subject to the BIC Exemption. Under the Re-Proposed Rule, the Department may publish this data to the public.

The Coalition supports the six-year retention requirement; this is consistent with current retention obligations under FINRA and SEC rules.<sup>63</sup> However, the Coalition has concerns about this information being made available to the public. The Coalition believes that the Department should

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<sup>63</sup> See 17 CFR § 240.17a-3, 17 CFR § 240.17a-4, and 17 CFR § 275.204-2 (2015).

retain this information for enforcement purposes, but should not publish it due to potential disclosure of privileged information and trade secrets. We are also concerned that publishing performance data on all Advisers will be harmful to the industry and not benefit Retirement Investors. Instead, the Coalition recommends that this data be protected under the Freedom of Information Act (FOIA) guidelines. If a Retirement Investor needs this information as part of an arbitration or lawsuit, he or she will be able to receive it through normal discovery mechanisms.

## **10. Definition of Related Entities**

The BIC Exemption addresses compensation received by Affiliates or Related Entities, with the latter defined as entities other than Affiliates in which an Adviser or Financial Institution has an interest that may affect the exercise of their best judgment as fiduciaries. The Coalition believes this definition is vague and subject to an overly broad interpretation. For example, the Coalition recognizes that many Advisers have other providers with whom they prefer to work for entirely proper reasons, including trusting their judgment and expertise. Under the Re-Proposed Rule, it could be argued that such a relationship could trigger the “Related Entity” definition.

The Coalition requests that the Department amend the Re-Proposed Rule by providing a clearer definition of Related Entity that might draw upon the specificity of the party in interest definition under ERISA. The Department should provide in the final rule examples of the kind of compensation received by a Related Entity that would violate the exemption, but the examples should not be broader than what would be allowed under the prohibited transaction rules found in ERISA § 406.<sup>64</sup>

### **ii. Proposed Low Fee Exemption**

The Department has asked for comment on whether the final rule should include a new “low fee exemption” that would allow firms to accept “conflicted” payments when recommending the lowest-fee products in a given product class. The Coalition does not support the creation of a low fee exemption.

While cost is a significant factor in a prudent process to select an investment, it is not the only factor and may not be the most important. The Coalition believes that the lowest cost product may not always be in the best interest of the Retirement Investor and that this exemption may provide an incentive for Advisers to recommend a lower-fee product even though a higher-fee product may be in the client’s best interest. Instead, the Coalition believes that when the Re-Proposed Rule becomes effective, the protections inherent in the best interest requirement will naturally favor lower cost products when they are in the Retirement Investor’s best interest. In sum, such a model should be left to the competition of the marketplace operating under a best interest standard.

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<sup>64</sup> See 29 U.S.C § 1106 (2012).

**d. Coalition Supports the Department's Expanded Enforcement Policies With Proposed Safeguards for the Consumer**

The Coalition commends the Department for recognizing, as part of the BIC and Principal Transaction Exemptions, the right of Retirement Investors to hold fiduciary Advisers accountable for providing advice in their best interest through a private right of action for breach of contract.

We believe this provision is an appropriate and necessary enforcement mechanism that gives teeth to the PTEs. This option is especially important for advice regarding IRA investments. Under current law, neither the Department nor the Retirement Investor who is harmed can hold the Adviser accountable under ERISA for the losses the IRA Retirement Investor suffered. The threat of private action will provide a strong incentive for Advisers and Financial Institutions to meet their fiduciary obligations under the Re-Proposed Rule and have practices and procedures in place to mitigate conflicted advice.

Given the significant barriers to the use of class actions to enforce the BIC Exemption, as noted above, the Coalition proposes the following modifications aimed at balancing the interests of Financial Institutions and Retirement Investors by ensuring that class actions are a practical, available, and truly enforceable option for Retirement Investors.

First, we are concerned with the ability and limited resources of arbitrators and state court judges to enforce the protections that have developed in the last forty years of ERISA jurisprudence. Thus, the Coalition believes the Re-Proposed Rule should be amended to require that the BIC Exemption contract include pre-drafted language approved by the Department that spells out very clearly the Best Interest Standard. This will be as close a substitute as possible to what the BIC Exemption cannot do, which is to mandate the use of federal law.

Second, the rule should be amended to disallow venue selection clauses in BIC Exemption contracts. These types of clauses can be very detrimental to Retirement Investors looking to enforce their rights. A Retirement Investor should have the right to sue in any venue allowed under the formal court procedural rules to enforce his or her rights.

Finally, the Department should acknowledge in the Re-Proposed Rule that in certain circumstances, ERISA may preempt any state law contract claims available to a Retirement Investor under the BIC Exemption. The governing law for a claim can significantly affect a party's rights in litigation. For example, parties have six years to file a lawsuit under ERISA if they don't have actual knowledge of a claim, while under state law they might have ten years to bring a breach of contract claim. The Coalition further recommends that the Department require that the BIC Exemption contract disclose the potential for an ERISA preemption in specific language provided by the Department consistent with our earlier recommendations.



**e. The Coalition Believes that the Department's Regulatory Impact Analysis Has Met the Requirements Imposed by Law**

The Administrative Procedure Act (APA)<sup>65</sup> and Executive Orders 12866<sup>66</sup> and 13563<sup>67</sup> require federal agencies to provide the public and the Office of Management and Budget ("OMB") with a careful and transparent analysis of the anticipated consequences of economically significant regulatory actions, a "Regulatory Impact Analysis."

According to the Office of Information and Regulatory Affairs ("OIRA"), the OMB office that plays a key role in coordinating the review of Federal regulations, "the purpose of the Regulatory Impact Analysis is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences."<sup>68</sup> That is, to (1) establish whether Federal regulation is necessary and justified to achieve a social goal and (2) design any such regulation in the most efficient, least burdensome, and most cost-effective manner.

A comprehensive Regulatory Impact Analysis will generally include three basic elements: (1) a statement of the need for the regulatory action; (2) a clear identification of a range of regulatory approaches; and, (3) an estimate of the costs and benefits of the proposed regulatory action and its alternatives, and should be based on the best available scientific, technical, and economic information.

The Coalition believes that the Department's Regulatory Impact Analysis has met the requirements of the APA and Executive Orders.

The Department provided a statement of the need for the regulatory action. The Department contends that the current rule, which substantially narrowed the broad statutory language conferring fiduciary status on all persons rendering investment advice for a fee to a plan or an IRA, has been overtaken by subsequent and dramatic changes in the design, operation, and marketing of employer-sponsored retirement plans with a resulting increase in the need for expert financial advice. Additionally, the Department states that "IRAs' important role in retirement security, which warrants special protections against conflicts in advice, underscores the need for the new proposal to ensure the broad application of these protections" and that these consumer protections should go beyond those applicable to other retail investment accounts.

The Department has provided a clear identification of a range of regulatory approaches. The Regulatory Impact Analysis discusses the regulatory alternatives that the Department considered before settling on the Re-Proposed Rule. These alternatives include: (1) excluding IRAs in whole or part from the rule; (2) not issuing the PTEs; (3) adopting the statutory definition of fiduciary

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<sup>65</sup> Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2012).

<sup>66</sup> Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735, Oct. 4, 1993.

<sup>67</sup> Executive Order 13563, "Improving Regulations and Regulatory Review," 76 FR 3821, Jan. 21, 2011.

<sup>68</sup> OIRA, "Regulatory Impact Analysis: A Primer," *available at* [https://www.whitehouse.gov/sites/default/files/omb/info/req/regpol/circular-a-4\\_regulatory-impact-analysis-a-primer.pdf](https://www.whitehouse.gov/sites/default/files/omb/info/req/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf).

advice; (4) relying heavily on disclosure as an adequate consumer protection; (5) deferring this rulemaking until the SEC takes related actions; (6) treating certain ESOP valuations as fiduciary advice; (7) conditioning the PTEs on disclosure alone; (8) issuing a streamlined, “low-fee” PTE; (9) issuing a prescriptive PTE in lieu of the proposed “best interest contract” exemption; (10) prohibiting mandatory binding arbitration; (11) adjusting the date by which affected advisers must comply; and, (12) delaying the Re-Proposed Rule’s compliance date.<sup>69</sup>

The Department has provided an estimate of the costs and benefits of the proposed regulatory action and its alternatives. As noted above, the Department estimates that the compliance cost associated with the proposal will total between \$2.4 billion and \$5.7 billion over 10 years.<sup>70</sup> If the Department adopts some of the Coalition’s proposed revisions to its rules, including the contracting, disclosure and recordkeeping requirements associated with exercising the BIC Exemption, these estimated compliance costs could be reduced. Additionally, the Regulatory Impact Analysis “quantifies” gains of between \$40 billion and \$44 billion over 10 years and between \$88 billion and \$100 billion over 20 years. Under the Regulatory Impact Analysis, the benefits to Retirement Investors significantly outweigh the projected costs to the financial services industry.<sup>71</sup>

## **V. Conclusion**

The Coalition commends the Department for taking steps to enhance protections for Retirement Investors. We believe that there is no justification for applying different standards of care to Advisers who are offering the same services to Retirement Investors and that a strengthened fiduciary rule is necessary and appropriate for Advisers and Financial Institutions under ERISA.

The current regulatory framework allows Advisers’ and Financial Institutions’ interests to be misaligned with Retirement Investors’ interests. Specifically, the current fiduciary definition under ERISA includes significant loopholes that allow for the sale of products that may not be in the best interest of the Retirement Investor. Importantly, while many Advisers seek to do what is best for their customers, others take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the Adviser well but eat away at Retirement Investors’ nest eggs over time. The Coalition believes that requiring an Adviser to work in the Retirement Investor’s best interest is an essential and long overdue reform. We urge the Department to move forward expeditiously with a final rule that incorporates proposed adjustments designed to make it more workable for Advisers and Financial Institutions without sacrificing provisions designed to protect Retirement Investors.

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<sup>69</sup> U.S. Dep’t of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, available at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

The Coalition appreciates the opportunity to comment on the Department's re-proposed changes to the definition of the term "fiduciary." We would be happy to meet with the Department to discuss these important issues further. If you have any questions regarding this comment letter or the Coalition, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, at (202) 379-2235 or [MMohrman-Gillis@CFPBoard.org](mailto:MMohrman-Gillis@CFPBoard.org).

Sincerely,



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